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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

No. 81 6773

TERESA KAY KIME and
DONALD RICHARD BONWELL, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

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The petitioners, Teresa Kay Kime and Donald Richard Bonwell, pray that a writ of certiorari issue to review the judgment entered by the United States District Court for the Middle District of North Carolina on June 16, 1980, finding them guilty of casting contempt on the flag of

the United States which judgment was affirmed by the United States Court of Appeals for the Fourth Circuit entered January 28, 1982.

QUESTIONS PRESENTED

1. Whether an avowed communist can be convicted for the purpose of casting contempt on the flag of the United States when the trial judge refused to accept any evidence on the issue of the defendant's intent.

2. Whether the burning of one's own flag in a public place without threat to others for the purpose of expressing a political idea is constitutionally protected speech.

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OPINIONS BELOW

The opinion of the Fourth Circuit, rendered on January 28, 1982 in unpublished. It is reprinted as Appendix A to this Petition. (pp. 21-22, infra) Petitioners petition for rehearing en banc was denied by the Court of Appeals on March 24, 1982. The opinion of the United States District Court for the Middle District of North Carolina is unpublished. It is reprinted as Appendix B to this Petition. (pp. 23-30 infra)

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment, United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of greivances.

18 U.S.C. §700(a):

Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

The petitioners, Teresa Kime and Donald Bonwell, seek review of their conviction in the United States District Court for the Middle District of North Carolina for burning a United States flag. Jurisdiction of the District Court was premised upon the petitioners' alleged violation of 18 U.S.C. §700, the federal flag desecration statute.

On March 27, 1980, Teresa Kime and Donald Bonwell were participants in a peaceful political protest held on a public sidewalk in front of the federal post office and courthouse in Greensboro, North Carolina. The demonstration held by supporters of the Revolutionary Communist Party (RCP) was for the purpose of advertising the party's May 1st demonstrations. The demonstrators were also protesting the recent reinstitution of criminal charges against RCP Chairman Bob Avakian, who had been arrested at a January, 1979, demonstration near the White House. During the course of the demonstration on March 27, 1980, red flags were waived and a privately owned United States flag was burned.

The United States Attorney in Greensboro thereafter issued an information charging Donald Bonwell and Teresa Kime with casting contempt on a United States flag by publicly burning it in violation of 18 U.S.C. §700. Prior to trial, each defendant filed motions to dismiss the information on the grounds that 18 U.S.C. §700 was unconstitutional on its face and that, as applied to each defendant, it

infringed the rights protected under the First Amendment to the United States Constitution. After an evidentiary hearing, the Court denied both motions to dismiss.

A trial by jury before a United States Magistrate began on June 16, 1980. At the outset of the trial, the Magistrate instructed counsel not to introduce any evidence as to the purpose of the demonstration or concerning statements made by the defendants or the participants in the demonstration. Throughout the course of the trial, the Magistrate repeatedly excluded any evidence as to the purpose of the demonstration and flag burning. The Magistrate further denied the defendants' requests that they be allowed to make offers of proof on these matters out of the hearing of the jury. Prior to the jury arguments, the Magistrate instructed defense counsel not to argue to the jury the facts that would explain the context of the flag burning or that the defendants may have burned the flag for a purpose other than that of casting contempt upon it. Thereafter the Magistrate sustained the government's objections to defense counsel's jury arguments on these points. Upon conviction, each defendant was sentenced to eight months imprisonment.

Both defendants appealed to the United States District Court. In their appeal, the defendants again challenged the constitutionality of 18 U.S.C. §700. Each also challenged the Magistrate's rulings restricting the evidence and counsel argument and the sufficiency of the evidence to support their convictions. In a memorandum decision United States District Judge Hiram H. Ward upheld the constitutionality of the prosecution under 18 U.S.C.

§700. He further ruled that the restriction of the evidence to the mere act of flag burning was not prejudicial to the defendants. He further found that the evidence of their guilt was sufficient, holding that the defendants could have had no purpose in burning the United States flag other than to cast contempt upon it.

Upon appeal to the United States Court of Appeals for the Fourth Circuit, the Court upheld the convictions of the defendants on the grounds stated in United States District Judge's opinion. The Defendants' petition for rehearing by the Court of Appeals for the Fourth Circuit was denied on March 24, 1982.

REASONS FOR GRANTING THE WRIT

1. The refusal of the trial court to permit the admission into evidence of testimony regarding the intent of the defendants eliminated an important element of proof required under 18 U.S.C. §700 and is in conflict with prior decisions of this Court.

Title 18, Section 700 of the United States Code states, in pertinent part:

> "whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both." (emphasis added)

From the very language of the statute, it is clear that the offense is not knowingly burning a United States flag but knowingly casting contempt on the flag by an act of burning. Thus, a crucial element of the offense is whether the intent of the defendants was to cast contempt on the flag itself. The Magistrate's ruling, which effectively restricted the evidence to the mere act of flag burning vitiated the critical element of the offense--the intent of casting contempt on the flag itself. Throughout the trial, the United States Magistrate refused to permit any testimony concerning words spoken by the defendants or others present when the flag was burned. He even refused to permit this evidence to be taken for the record out of the presence of the jury. The Magistrate also

forbade counsel for the defendants from addressing the matter of intent or presenting arguments about the political context of the flag burning in their closing arguments to the jury. From jury voire dire to closing instruction, the Magistrate, after identifying the defendants as communists, blocked every attempt counsel made to present a connection between the defendants' political beliefs and their actions. The District Court, when faced with this question on appeal, held that the evidence was sufficient because there could be no other purpose for publicly burning a flag than to cast contempt upon it. The Court of Appeals adopted this logic in its decision.

The reported cases, including the cases reported in the decisions of this Court, well illustrate that flags are rarely burned publicly to cast contempt on the flag itself but as a means of disagreement with the policies of the government with which the flag is identified. When we in this country hear of cases of Polish and Soviet flags being burned in the streets of Warsaw and Gdansk, we know that the members of Solidarity are not casting contempt on the Polish and Soviet flags themselves, but are protesting the restrictions placed on liberties which in this country we would expect to be protected by the First Amendment.

The decisions of the courts below in this matter in equating the act of flag burning with the intent to cast contempt upon the flag itself constitute a serious misreading of the decisions of this Court and a perversion of the accepted methods of proof of intent.

It is well-settled that a jury may "infer the defendant's intent from the surrounding circumstances...[and] may consider any statement made and done or omitted by the defendant and all other facts and circumstances in evidence which indicate his state of mind." Devitt and Blackmar, Federal Jury Practice and Instructions, Vol. 1, §14.13 (1981).

In Street v. New York, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969), while holding that a defendant could not be convicted of flag desecration solely because of words spoken, the majority opinion clearly indicated that the introduction of defendants' statements is admissible for the purpose of showing the intent which might undergird a person's actions. 394 U.S. at 594, 22 L.Ed.2d at 586. The problem in Street was that "[t]he State never announced that it was relying exclusively upon the burning. The trial judge never indicated that he regarded appellant's words as relating solely to intent." 394 U.S. at 590, 22 L.Ed.2d at 583.

In Spence v. Washington, 418 U.S. 405, 41 L.Ed.2d 842, 94 S.Ct. 2727 (1974), the defendant affixed a large peace symbol to the United States flag and flew it upside down from an apartment window. While the trial court in Spence did allow the defendant to testify at trial about his reasons for affixing the peace symbol, it had instructed the jury that the mere act of affixing the symbol was sufficient to convict. The Supreme Court extensively examined the question of intent on this evidence and the majority concluded that "the context in which a symbol is used for purposes of expression is important for the context may give meaning to the symbol

....It may be noted further that this was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government." 418 U.S. at 410, 41 L.Ed.2d at 846-847. On the facts of the case, based largely on this evidence of intent, the Court reversed the conviction.

In the present case, the Magistrate barred the defendants from even presenting what their intentions were so that the finders of fact could decide whether or not the act was more than "mindless nihilism." The District Court on appeal upheld the exclusion of evidence by the Magistrate on the grounds that this evidence was potentially prejudicial to the defendants themselves and that this "potential prejudice outweighed the relevance, if any, of the evidence offered." (Appendix B, p. 27) This conclusion was reached even though the Magistrate had repeatedly cut off the defendants from making any offer of proof for purposes of preserving a record for appeal.[1]

1/ At a pre-trial hearing, a television station's video tape of a portion of the protest where the flag was burned was viewed by the Magistrate. It was never offered into evidence at the trial and counsel for the defendants clearly stipulated to its admissibility only for purposes of the pre-trial motions. As a result of the pre-trial hearing charges were dismissed against two co-defendants. Because of the Magistrate's rulings prohibiting introduction of evidence concerning the intent of the defendants at trial, there is simply no way to ascertain

The importance and relevancy of the excluded evidence to the defendant's case cannot be overstated. By such arbitrary action, the Magistrate denied the defendants their Constitutional right to confrontation of witnesses against them and to present evidence on their own behalf. By so acting, the Magistrate totally excluded highly relevant evidence. He thus effectively removed from the jury any ability to consider whether the acts of the defendants were done with the specific intent[2] of knowingly casting contempt on the flag.

1(cont.)/ whether the testimony would have been consistent with what was contained on the video tape.

2/ In State v. Turner, 474 P.2d 91, 41 A.L.R.3d 493 (Wash 1970), a conviction under a virtually identical state statute based on evidence that the defendant was holding a flag of the United States while another set fire to and destroyed the flag by burning was reversed on the ground that the record did not show what was said before or after the flagburning from which the actual intent, design, or purpose of the alleged act could be determined. The court observed that words used in the statute such as "deface" and "defile" strongly imply that the described conduct shall be held criminally actionable only when done with an evil design or purpose.

2. The conduct for which the petitioners were convicted of violating 18 U.S.C. §700 was conduct protected by the First Amendment of the United States Constitution, and 18 U.S.C. §700 is overly broad and, therefore, unconstitutional.

In this case, the mere public commission of any one of the acts listed in 18 U.S.C. §700 has been held sufficient to subject a person to imprisonment of one year. In addition to burning, these acts include mutilating, defacing, defiling, or trampling a United States flag. This sweeping construction abridges important protections previously accorded to freedom of expression and conflicts with prior decisions of this Court which have addressed these issues.

Although the Court has never considered directly the the constitutionality and scope of 18 U.S.C. §700, two prior decisions have analyzed the First Amendment protections afforded in cases of flag desecration. The first of these was Street v. State of New York, 394 U.S. 576, 22 L.Ed.2d 571, 89 S.Ct. 1354 (1969). The Court in Street reversed the conviction of an individual charge under the New York state flag desecration statute. In Street, the Supreme Court determined that the defendant who may have been convicted merely for the words of contempt he expressed towards the United States flag, rather than his contemporaneous act of flag burning, was protected from prosecution by the First Amendment. The Court engaged in a four-part analysis and determined that no governmental interest in

preventing the desecration of the flag could override the First Amendment right of freedom of expression which protected the defendants' verbal comments.

In the wake of the Court's decision in Street, it remained unclear whether or not non-verbal acts of flag desecration would be afforded the same protection under the First Amendment, as symbolic conduct "akin to pure speech." See generally Ely, Flag Desecration: A Case Study in Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L.R. 1482 (1975).

There have been two prior Court of Appeals decisions upholding the constitutionality of 18 U.S.C. §700. Both were decided during this period of uncertainty. United States v. Crosson, 462 F.2d 96 (9th Cir. 1972), and Joyce v. United States, 445 F.2d 226 (D.C. Cir. 1971). In these cases, which read §700 of Title 18 more restrictively than did the courts in the present case, writs of certiorari were denied. United States v. Crosson, 409 U.S. 1064, 34 L.Ed.2d 517, 93 S.Ct. 569 (1972), and Joyce v. United States, 405 U.S. 969, 31 L.Ed. 2d 242, 92 S.Ct. 1188 (1971).

Subsequently, in 1974, in Spence v. State of Washington, supra, the Supreme Court once again addressed the question of what protections under the First Amendment should be afforded acts of flag desecration. Spence concerned an act of flag desecration that involved no verbal element. Nevertheless, the Supreme Court's decision in Spence employed the Street analysis and accorded the same degree of

First Amendment protection for physical flag desecration as was afforded to the verbal desecration in Street.

The Court noted four factors in Spence, all of which are also present in this case:

First, the flag was privately owned.

Second, the defendants (while not on private property) were not engaged in trespass or disorderly conduct. There was no contention by the government that the defendants had violated any time, place, or manner restraints in their presence with others in a public place.

Third, the record is devoid of any risk of breach of the peace. The public demonstration was brief and peaceful. Leaflets were handed out, speeches and chants made, flags waived and one was burned, and then without incident the political rally ended--all in less than an hour.

Fourth, the defendants engaged in a form of communication, although some of the content of that communication was kept out of evidence by the trial court over the repeated objections of the defendants.

The Court in Spence did note that the issue of destruction or permanent damage to the flag was not before it. 418 U.S. at 413-414, 41 L.Ed.2d at 848-849. To that extent, the Court has never addressed either the specific statutory language or conduct present in this case. This, however, does not diminish the conflict between the court's decision in Spence and the construction of 18 U.S.C. §700 which

the courts below employed to uphold the petitioners' convictions. Section 700 not only forbids public burning but also public defacing as a means of casting contempt on the flag. In Spence, the defendant defaced the flag, albeit not permanently. The jury in Spence convicted him despite his explanation of his actions. If the decisions for which the petitioners seek review were the law of the land, Mr. Spence clearly could have been convicted of violating §700 and his conviction would have been affirmed.

This misreading of Spence creates a pressing need for clarification of 18 U.S.C. §700.

Section 700 casts a sweeping chill over every dissident who would seek to express concern with the existing order by using an American flag in anything other than its pristine condition. Section 700 as applied in this case subjects all persons to the threat of criminal sanction for any public burning of American flags whether or not the burning is connected with inciting others to commit unlawful acts or is so inflammatory that it would likely provoke others to retaliate physically and thereby cause a breach of the peace.

The use of red flags and the mistreatment of the American flag in a public manner are historically acts of political communication. Spence, supra, and Stromberg v. California, 283 U.S. 359, 75 L.Ed. 1117 (1931). The petitioners were expressing graphically to those both close at hand and those passing by at a distance a choice not between two flags but between the world-views the flags represented.

They were also protesting the United States Department of Justice's prosecution of their political leader. Admittedly, such views are unpopular and distasteful to many Americans. Historically, it has been the holders of controversial and unpopular political views who have been prosecuted under this and other American flag statutes. To punish such expression by criminal sanctions strikes at the heart of the freedoms protected by the First Amendment.

In Street v. State of New York, supra, Mr. Justice Harlan directly addressed this concern, quoting from Mr. Justice Jackson's opinion in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943):

> "We have no doubt that the constitutionally guaranteed 'freedom to be intellectually ...diverse or even contrary,' and 'the right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptous." 394 U.S. at 593, 22 L.Ed.2d at 586.

Mr. Justice Harlan leaves unresolved the matter of whether a person can be punished for burning his or her own American flag, even though the burning was an act of peaceful protest. It is the contention of the petitioners that the mutilating, defacing, defiling, trampling, or burning of one's own United States flag in a public place without threat or injury

to others for the purpose of expressing a political opinion is constitutionally protected speech.

CONCLUSION

Petitioners, for the reasons set forth above, respectfully petition this honorable Court for the granting of a Writ of Certiorari.

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Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5160(L)

United States of America,

Appellee,

v.

Teresa Kay Kime,

Appellant.

No. 81-5161

United States of America,

Appellee,

v.

Donald Richard Bonwell,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, District Judge.

Argued: December 10, 1981

Decided: January 28, 1982

Before RUSSELL, SPROUSE and CHAPMAN, Circuit Judges.

Michael W. Patrick (Haywood, Denny & Miller on brief) for Appellant Donald Bonwell; John R. Kernodle, Jr. (Smith, Patterson, Follin, Curtis, James & Harkavy on brief) for Appellant Teresa Kime; David B. Smith, Assistant United States Attorney (Benjamin H. White, Jr., United States Attorney, John W. Stone, Jr., Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

The defendants appeal from a judgment of the district court. Each defendant had consented to be tried before a United States Magistrate and each was convicted by a jury of flag desecration in violation of 18 U.S.C. §700. They raise ten issues on appeal to this court. These issues were previously raised on appeal to the district court. Each issue has been answered by the memorandum opinion of the district court, and we affirm for the reasons stated therein. United States of America v. Teresa Kay Kime and Donald Richard Bonwell, CR.-80-95-G (m.D.N.C. June 12, 1981).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	Cr-80-95-G
	:	
TERESA KAY KIME	:	
DONALD RICHARD BONWELL	:	

MEMORANDUM OPINION

This matter is before the Court on the appeal of the defendants Teresa Kay Kime and Donald Richard Bonwell from their convictions of knowingly casting contempt upon the United States flag by publicly burning it, 18 U.S.C. §700. Defendants assert numerous errors arising out of their jury trial before the Magistrate which the Court briefly will discuss seriatim.

Defendants first argue that 18 U.S.C. §700 is unconstitutional on its face and as applied to them because it chills First Amendment rights. To the contrary, the Court concludes (1) that the statute is narrowly drawn to avoid direct infringement; and (2) that any incidental burden it imposes is no greater than is essential to further a legitimate governmental interest unrelated to suppression of free expression.

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.572 (1969); United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968); United States v. Crosson, 462 F.2d 96 (9th Cir.), cert. denied, 409 U.S. 1064 (1972); Joyce v. United States, 454 F.2d 971 (D.C.Cir. 1971), cert. denied, 405 U.S. 979 (1972); Hoffman v. United States, 445 F.2d 225 (D.C.Cir. 1971); United States v. Ferguson, 302 F. Supp. 1111 (N.D.Cal. 1969). Furthermore, the Magistrate meticulously insured that the jury did not convict defendants because of any constitutionally protected expression that may have accompanied their flag burning. Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572.

Pretrial, defendants moved that the Court order the government to disclose the existence and contents of any electronic surveillance conducted on them. The government responded that none of its evidence was derived from such surveillance. Later, the prosecuting attorney stated that the government had conducted no electronic surveillance in this case and that he knew of none conducted during the period mentioned in defendants' motion. Defendants contend that the contents of any such surveillance would have exculpated them by showing lack of intent to cast contempt on the flag and that the Court should have required the government to deny its existence by appropriate affidavit.

The affidavit requirement to which the defendants refer pertains to situations in which a party suspects that adverse evidence is the fruit of illegal electronic surveillance. 18 U.S.C. §3504(a); see, e.g., Beverly v. United States, 468 F.2d 732, 744-45 (5th Cir. 1972); United States v. Doe, 451 F.2d 466 (1st Cir. 1971). The transcript of defendants' trial reveals that the government could not have possibly derived any of its evidence from illegal surveillance. Furthermore, the government is not required to give a defendant assurances concerning exculpatory evidence absent a particularized showing of the existence and materiality of such evidence by the defendant. United States v. Anderson, 481 F.2d 685, 690 n.2 (4th Cir. 1973), aff'd on other grounds, 417 U.S. 211, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974). The Court doubts that electronic surveillance, if undertaken, could have produced admissible evidence exculpating defendants. In any event, the defendants failed to make the proper showing. The prosecuting attorney's denial, which the Court has no reason to question, was sufficient.

Defendants next complain of the Magistrate's refusal to ask a number of questions submitted by them during jury voir dire. The questions fall generally into two categories--those directed at ascertaining bias towards defendants and their views and those directed at ascertaining attitudes concerning the weight they would give testimony of law enforcement officers. A trial court has broad discretion in

conducting jury voir dire. United States v. Jones, 608 F.2d 1004, 1997 (4th Cir. 1979); United States v. Johnson, 527 F.2d 1104, 1107 (4th Cir. 1975). "In almost any case there can be developed a series of questions designed to uncover some possible juror prejudice, but the orderly functioning of the judicial process requires that the trial court be allotted some flexibility to place reasonable limitations on juror examination." United States v. Tramunti, 513 F.2d 1087, 1114 (2d Cir.) cert. denied, 351 U.S. 979 (1956).

The Magistrate preliminarily instructed the jury venire that defendants were not on trial and could not be convicted for their views, anything that they said during the flag burning or their association with the Revolutionary Communist Party. He explained to the jury that defendants were not connected with the Communist Workers Party. His questions which followed, concerning prejudice for or against either the government or defendants and towards the nature of the crime alleged, therefore, adequately covered the subject. Although stated in general terms, those questions obviously related back to the matters about which the Magistrate had previously warned the jury. Then, if a potential juror answered affirmatively to a question concerning the existence of a relative connected with law enforcement, the Magistrate followed up with an inquiry directed at discovery of improper attitudes towards the weight given testimony of law enforcement officers. Each potential juror, thereafter, was questioned thoroughly about his or his spouse's employment or military experience. Finally, the Magistrate quite liberally allowed challenges for cause.

Some of the defendants' proposed questions were propagandist or inflammatory. The questions asked, however, insured that the quest to expose possible taint did not create prejudice where none had previously existed.

Defendants also argue that they should have received more than the normal three peremptory challenges, Fed.R.Civ.P 24(b). However, in light of the liberal allowance of challenges for cause and counsel's ability to agree on which jurors to excuse, no reason for allowing extra challenges existed.

Turning to the evidence, defendants object to the exclusion of two categories of evidence. Those categories include evidence which defendants argue would have shown bias on the part of the government's witnesses and defendants' lack of intent to cast contempt upon the flag. However, as to both categories, the evidence offered would have prejudiced defendants because of the views they had expressed and other activities in which they had engaged before and during the flag burning. This potential prejudice outweighed the relevance, if any, of the evidence offered.

The evidence admitted at the trial was sufficient to sustain defendants' convictions. United States v. Crosson, 462 F.2d 96; Joyce v. United States, 454 F.2d 971. The evidence and inferences therefrom most favorable to the government warranted the jury's finding defendants guilty beyond a reasonable doubt. Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141, _____, 57 L.Ed.2d 1, 13 (1978). In regard to defendants' contentions concern-

ing intent, the Court has difficulty imagining a situation in which someone could burn a flag as a means of doing anything other than casting contempt unless it was done inadvertently or to dispose of a soiled or worn flag. Defendants have never suggested or alluded to any evidence to show such was the case here.

Defendants assert that two errors occurred during jury argument. First, they point to a comment by the prosecuting attorney which they believe injected his belief as to the credibility of the government witnesses. United States v. Morris, 568 F.2d 396 (5th Cir. 1978). The Court does not view the prosecutor's brief comment as having substantial potential to influence the jury impermissibly. In any event, taken in the context of the entire argument, the evidence in the case and the jury instructions, the comment, if error, was harmless. United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980). Also, defendants did not object contemporaneously to the comment, see United States v. Anderson, 481 F.2d at 694 & n.12, but merely requested an instruction later to the effect that officers may have a stake in the outcome and that the jury should weigh that interest along with all other factors. This request was not directed at informing the jury that they should disregard the prosecutor's comment. More importantly, the Magistrate adequately instructed the jury that they should consider the witnesses' relationship to the government and their interest in the case. To have made direct reference to the prosecutor's comment at that time would only reemphasize it to the jury. Secondly, defendants contend their jury

argument was unfairly restricted. The Magistrate committed no error in this regard. He only prevented defendants from arguing issues of law, including the question of defendants' First Amendment rights. When he cut off some of their remarks in midstream, he reasonably believed that they were embarking on an impermissible course.

Defendants requested several instructions in a form which the Magistrate refused to give. However, his charge as a whole covered all relevant points and explained the essential issues for the jury. It set forth in understandable fashion the elements of the crime charged. Although defendants would have had the Magistrate emphasize the element of intent in a different manner, he properly explained that, to convict defendants, the jury must be convinced beyond a reasonable doubt that defendants burned the flag as a means of casting contempt upon it. Defendants' objection to the inclusion of an aiding and abetting instruction is meritless since the jury found both defendants guilty of the principle offense and did not have to reach the aiding and abetting issue.

One of the jurors moved her official residence out of the district on the day that trial began. When this was discovered near the end of the evidence, defense counsel agreed to her continuing to serve on the jury; however, they now argue that defendants themselves did not knowingly waive any right to have her stricken. The simple answer to defendants' contention is that, irrespective of whether they waived any right, they can show no prejudice from her having remained on the jury.

In conclusion, the Magistrate did an admirable job of insuring that defendants received a fair trial. As far as practicable, he shielded them from conviction for protected expression or conduct in spite of defendants' apparent attempts to inject those matters into the trial. Therefore, the judgments of conviction entered herein are AFFIRMED.

s/ Hiram H. Ward

United States District Judge

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81 6773

TERESA KAY KIME and
DONALD RICHARD BONWELL, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 1982, a copy of the Petition for Writ of Certiorari was mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81 6773

TERESA KAY KIME and DONALD RICHARD BONWELL, Petitioners,	)	
v.	)	MOTION FOR LEAVE TO PROCEED
UNITED STATES OF AMERICA, Respondent.	)	IN FORMA PAUPERIS

The petitioners, Teresa Kay Kime and Donald Richard Bonwell, ask leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioners have been represented in forma pauperis in prior proceedings in this matter by the undersigned counsel pursuant to their appointment by the United States District Court for the Middle District of North Carolina and the United States Court of Appeals for the Fourth Circuit under the Criminal Justice Act.

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I hereby certify that on this 21st day of May, 1982, a copy of the Motion for leave to Proceed in Forma Pauperis was mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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No. 81-6773

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TERESA KAY KIME and DONALD RICHARD BONWELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 700(a), which prohibits the contemptuous burning of the American flag in public, violates the First Amendment's protection of freedom of speech.

2. Whether the district court correctly excluded evidence of petitioners' political purpose in burning the American flag.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 81-6773

TERESA KAY KIME and DONALD RICHARD BONWELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 21-22) is not reported. The memorandum opinion of the district court (Pet. App. 23-30) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1982 (Pet. App. 22). A petition for rehearing was denied on March 24, 1982 (Pet. 6). The petition for a writ of certiorari was filed on May 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial before a magistrate in the United States District Court for the Middle District of North Carolina, 1/ petitioners were convicted of knowingly casting contempt upon the United States flag by publicly burning it, in violation of 18 U.S.C. 700. Both were sentenced to terms of eight months' imprisonment. The district court (Pet. App. 28-30) and the court of appeals (id. at 21-22) affirmed both convictions.

1. Prior to trial, petitioners moved to dismiss the indictment, claiming that 18 U.S.C. 700 is "unconstitutional on its face and as applied * * * under the First Amendment to the Constitution of the United States of America" (J.A. 315, 320). The magistrate held an evidentiary hearing and denied both motions (J.A. 351-354).

The evidence at trial showed that on March 27, 1980, petitioner Kime carried an American flag attached upside down on its staff in front of the Federal Building in Greensboro, North Carolina (C.A.App. 89). Petitioner Kime was observed lowering the flag to the ground and petitioner Bonwell was seen bending over it. After a few seconds petitioner Kime raised the flag, which was then burning, and waved it back and forth (id. at 89, 109, 133). When the flag had burned almost completely, she threw the staff and the remains of the flag to the ground, in the direction of the Federal Building (id. at 108-109, 146). Before it was burned, the flag appeared to be new and was not soiled (id. at 137).

During the trial petitioners attempted on several occasions to present evidence regarding the beliefs of the Revolutionary Communist Party, of which both claimed to be members, and

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1/ Petitioners consented to jury trial before the United States Magistrate (C.A. App. 326). "C.A. App." refers to the joint appendix filed with the court of appeals.

regarding the political purpose of the demonstration in which the flag burning occurred. The magistrate excluded the evidence of political purpose and belief on the ground that the evidence was relevant only to whether petitioners' conduct was protected First Amendment activity, which was a question for the court and not the jury (C.A. App. 68-69, 123, 170) 2/

2. The district court affirmed petitioners' convictions. It upheld Section 700's constitutional validity, concluding (Pet. App. 23-24; citations omitted):

> (1) that the statute is narrowly drawn to avoid direct infringement [on First Amendment rights]; and (2) that any incidental burden it imposes is no greater than is essential to further a legitimate governmental interest unrelated to suppression of free expression. Furthermore, the Magistrate meticulously insured that the jury did not convict defendants because of any constitutionally protected expression that may have accompanied their flag burning.

The district court also affirmed the magistrate's decision to exclude petitioners' evidence regarding their political motives on the ground that such evidence was irrelevant and potentially prejudicial (Pet. App. 27).

The court of appeals affirmed "for the reasons stated" by the district court (Pet. App. 22).

ARGUMENT

1. Petitioners contend (Pet. 15-20) that the contumacious burning of the American flag cannot be prohibited consistent with the First Amendment, and that 18 U.S.C. 700 is unconstitutionally overbroad. The decision of the court of appeals rejecting this argument is in accordance with the decisions of all other courts of appeals that have decided the issue and conflicts with no decision of this Court. Accordingly, the decision does not warrant further review.

2/ In this regard, the magistrate specifically instructed the jury that it is not a crime to demonstrate, to deprecate the United States, or to be a communist, and that the jurors should disregard any evidence of such conduct; that petitioners were only charged with knowingly casting contempt upon the flag of the United States by publicly burning it, in violation of 18 U.S.C. 700 (C.A. App. 275-276).

Assuming for the purposes of argument that the burning of an American flag, under the circumstances here presented, is expressive conduct under the First Amendment, 3/ the regulation of such conduct is justified under the reasoning of this Court in United States v. O'Brien, 391 U.S. 367, 377 (1968). There the Court adopted a four prong test for evaluating the constitutional validity of a statute prohibiting the expressive act of burning a draft card. Such a regulatory statute is permissible (ibid.)

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

As the district court correctly concluded (Pet. App. 23), the statute here meets all four parts of the O'Brien test.

First, it cannot be seriously doubted that Congress has Article I power to protect the flag from public acts of contemptuous destruction and desecration. See United States v. Crosson, 462 F.2d 96, 99 (9th Cir.), cert. denied, 409 U.S. 1064 (1972); Joyce v. United States, 454 F.2d 971, 985-986 (D.C. Cir. 1971), cert. denied, 405 U.S. 969 (1972); Hoffman v. United States, 445 F.2d 226, 228 (D.C. Cir. 1971).

Second, the statute here, as found by the courts and Congress, furthers an important governmental interest, viz., preservation of the flag, not as a mere chattel, but as the "visible embodiment of the Nation." Joyce v. United States, supra, 462 F.2d at 101; Hoffman v. United States, supra, 445 F.2d at 228. As Congress found in adopting 18 U.S.C. 700, "[p]ublic burning, destruction, and dishonor of the national emblem

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3/ This Court has cautioned that it "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968).

inflicts an injury on the entire Nation." S. Rep. No. 90-1287, 90th Cong., 1st Sess. 3 (1968).

Third, the government's interest is wholly unrelated to the suppression of free speech. The statute was not intended to and "does not prohibit speech, the communication of ideas, or political dissent or protest * * * [nor does it] prescribe orthodox conduct or require affirmative action." 4/ S. Rep. No. 90-1287, supra, at 3. Instead "the legislation was enacted to prohibit the physical act of contemptuously burning a flag, rather than to in any way suppress free speech." United States v. Crosson, supra, 462 F.2d at 102. See also Joyce v. United States, supra, 454 F.2d at 989.

Finally, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest protected by the statute. On the advice of the Attorney General, Section 700 was narrowly drawn to proscribe only those physical acts that Congress concluded demonstrated an unmistakable intention to cast contempt upon the flag. By its clear terms, the statute makes it a crime for anyone to "knowingly cast[ ] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it * * *." 18 U.S.C. 700. The statute is thus limited to "public acts of physical dishonor or destruction of the flag of the United States * * * intentional, willful, not accidental or inadvertent public physical acts of desecration of the flag. Utterances are not proscribed * * *." S. Rep. No. 90-1287, supra, at 3. See also Smith v. Goguen, 415 U.S. 566, 582 n.30 (1974).

4/ The majority in Street v. New York, 394 U.S. 565, 585, 594 (1969), did not dispute the opinion of the dissenting justices that contemptuous physical destruction of the flag may be prohibited, but declined to address the issue since it concluded that Street might have been convicted on the basis of the words he had spoken rather than the burning of the flag.

Section 700 in no way prevented petitioners from communicating their beliefs. Under the statute, they could, and in fact did, express their views in many ways without the necessity of burning the American flag. Thus, petitioners' claim that the statute is overbroad is incorrect, United States v. Crosson, supra, 462 F.2d at 100-101; Joyce v. United States, supra, 454 F.2d at 984-985; see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., No. 80-1681 (Mar. 3, 1982), slip op. 5-6, and the court of appeals properly upheld the statute as constitutionally permissible on its face and valid as applied to petitioners' conduct. 5/

2. Petitioners next argue (Pet. 10-14) that it was error to exclude the evidence of their political purpose in burning the American flag. This claim is also without merit. The courts below correctly ruled (Pet. App. 27) that the evidence was irrelevant and would only tend to prejudice petitioners and therefore its exclusion was proper. Section 700 is carefully drafted to prohibit only those physical acts performed in circumstances which Congress considered as showing a clear intention to cast contempt upon the Flag. S. Rep. No. 90-1287, supra, at 3.

5/ Contrary to petitioners' assertion (Pet. 16-18), the decision below is not inconsistent with this Court's opinion in Spence v. Washington, 418 U.S. 405 (1974). In Spence, the defendant affixed a removable peace symbol to an American flag, displayed it in his apartment window, and was convicted under a state statute making it a crime to exhibit a flag "to which is attached or superimposed figures, symbols, or other extraneous material." Id. at 405. In holding the state statute unconstitutional as applied, the Court found significant that "[a]ppellant was not charged under the flag desecration statute * * * nor did he permanently disfigure the flag or destroy it. He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas." Id. at 415. The Court also noted that the flag was displayed on private property, and that the case could not be "analyzed in terms of reasonable time, place, or manner restraints on access to a public area." Id. at 409. Thus, Spence is clearly distinguishable from the present case, where the flag was contumaciously burned in a public place.

The statute, of course, does not forbid a burning of the flag that is accidental or inadvertent, or when the flag is "in such a condition that it is no longer a fitting emblem for display [and] should be destroyed . . . preferably by burning" (36 U.S.C. 176(k)). See S. Rep. 90-1287, supra, at 3. But any other public burning of the flag is a crime under the statute. Thus, the evidence petitioners proffered regarding their political beliefs and their purpose in burning the flag, was not relevant to any valid defense under the statute. 6/ The district court's evidentiary ruling, as affirmed, does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

R. CHRISTOPHER LOCKE
Attorney

AUGUST 1982

6/ As the district court found, the admission of this evidence would have been highly prejudicial since it would have created a risk that the conviction was based on constitutionally-protected expression. Cf. Street v. New York, supra, 394 U.S. at 589. Although petitioners presumably would be estopped to complain about any prejudice caused by the admission of their evidence, the district court certainly was under no obligation to allow the proceedings to be reduced to a debate on political ideas instead of a trial as to petitioners' guilt.

END OF DOCKET